UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	**CASE NUMBERS**
CHONG U. HAN and SUN A. HAN, Debtors,	BANKRUPTCY CASE NO. 04-69046-MGD
CITIBANK (SOUTH DAKOTA), N.A., Plaintiff, v. CHONG U. HAN, Defendant.	ADVERSARY CASE NO. 04-06478 IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

ORDER DENYING MOTION FOR DEFAULT JUDGMENT

This adversary proceeding is before the Court on a Motion for Default Judgment ("Motion") (Adversary Proceeding Docket No. 9) filed by Citibank (South Dakota), N.A. ("Plaintiff"). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and the Court has jurisdiction pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. The Court has reviewed the entire record in the case and the Motion and has determined that a hearing is not necessary to dispose of the matter.

On August 24, 2004, Plaintiff filed a complaint seeking to determine the dischargeability of a debt owed by Chong U. Han ("Defendant") pursuant to 11 U.S.C. § 523(a)(2)(A) and § 523(a)(2)(C). Defendant did not file an answer to the complaint. As a result Plaintiff filed the Motion that is presently before the Court. Due to the fact that Defendant did not respond to Plaintiff's Motion all of Plaintiff's allegations are therefore uncontroverted.

The Court notes that entry of default judgment is discretionary. *See* Fed. R. Civ. P. 55(b) made applicable in this proceeding by Fed. R. Bankr. P. 7055 ("Judgment by default *may* be entered" by the Court) (emphasis added) *See FDS National Bank v. Alam (In re Alam)*, 314 B.R. 834, 837 (Bankr.N.D.Ga. 2004) (Bonapfel, J.). First, the Plaintiff must prove a *prima facie* case in order to succeed on a motion for default judgment. *Capital One Bank v. Bungert (In re Bungert)*, 315 B.R. 735, 737 (Bankr.E.D.Wis. 2004) (internal citations omitted). The Court has reviewed the complaint and the record in the case and has concluded that Plaintiff has failed to allege facts sufficient to establish a basis for the Court to be able to grant judgment pursuant on either the § 523(a)(2)(A) or § 523(a)(2)(C) claims.

The Plaintiff's complaint sets forth few operative facts. Plaintiff is a creditor of Defendant by virtue of having issued a credit line to Defendant on a credit account. (Complaint, ¶4). Defendant opened the account with Plaintiff in August 1994. (*Id*., ¶7). According to the Complaint, at the time of the filing of Defendant's chapter 7 petition the outstanding balance on the account was $10,654.76. (*Id.,* ¶4). Between April 8, 2004 and April 25, 2004, Defendant accumulated charges in the amount of $3,918 (*Id*.,¶7). The last payment made by Defendant, before filing the chapter 7 petition on June 2, 2004, was a payment in the amount of $60 made on March 31, 2004. (*Id*.).

I. § 523(a)(2)(A)

Section 523(a)(2)(A) provides an exception from a chapter 7 discharge for a debt for "money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud...." 11 U.S.C. § 523(a)(2)(A). Plaintiff's complaint asserts that the subject debt should be deemed nondischargeable due to Defendant's representation that he would repay all amounts utilized in accordance with the terms and conditions set forth in the parties' loan agreement (Complaint, ¶6). The Court does not consider such an assertion to be a viable argument. "This representation is immaterial to nondischargeability and requires no discussion beyond stating

the established principle that breach of a mere promise to pay on a contract, without more, does not constitute false representation, false pretenses, or actual fraud. If it were otherwise, every default by every debtor failing to pay a just debt would qualify as a false representation or actual fraud, an obviously absurd result." *Alam*, 314 B.R. at 837-838 (internal citations omitted).

Plaintiff also contests that, "[e]ach and every time the Defendant used the credit line available in the account, Defendant represented that Defendant had the ability to repay the credit line which was advanced by Plaintiff. Defendant made such representations with the intention and purpose of deceiving Plaintiff into extending and continuing to extend the credit line." (Complaint, ¶6). As the Complaint does not set forth any express false or fraudulent representations made by the Debtor to Plaintiff, this assertion is based upon the notion that each use of the credit card by Plaintiff constituted an implied representation of the ability to pay. *Id.* at 838.

In *First Nat. Bank of Mobile v. Roddenberry (In re Roddenberry)*, 701 F.2d 927 (11th Cir. 1983), the 11th Circuit concluded that any potential false pretenses or false representation claim under § 17a(2) of the Bankruptcy Act of 1898 "must involve a determination of whether the [creditor] unconditionally revoked the cardholder's right to use and possession of that card and if so when the cardholder became aware of such revocation." *Alam* at 838, *citing Roddenberry,* 701 F.2d at 928. Only a debtor's use of a credit card after an unconditional and unequivocal revocation by the creditor can establish false pretenses or false representation. Plaintiff has not set forth such facts in its complaint to establish a claim under false pretenses or false representation based upon 11th Circuit law. As such, any claim under false pretenses or false representation must fail.

Plaintiff also contends that Defendant's actions amount to actual fraud and as a result of Defendant's fraud a loss was suffered by Plaintiff. (Complaint, ¶8). However, Plaintiff sets forth few facts that could allow the Court to infer actual subjective fraudulent intent. The

complaint states that "Defendant was already insolvent at the time of the purchases, and did not have the present ability or realistic future possibility to repay the debt. Pursuant to Defendant's [S]chedule I, Defendant was unemployed when the charges were made. Defendant therefore had an actual subjective intent to defraud Plaintiff by accepting the benefits of the credit line without ever intending to repay same." (Complaint, ¶9). The Court can not make a finding of actual fraud based solely upon this assertion. While Defendant's Schedule I reveals one of the two debtors was unemployed at the time the petition was filed, it does not state the length of the unemployment. The Defendant may have been employed when making the charges, but subsequently lost his job before filing the petition. In fact the Statement of Financial Affairs indicates that the parties owned and operated a grocery store through April 22, 2004. Additionally, even if the Defendant were unemployed when making many of the charges at issue, Schedule I shows income for the spouse. Presumably the debt could have been paid using the spouse's income. Based upon the facts as currently alleged in the complaint the Court can not make a finding of actual fraud as required by § 523(a)(2)(A).

II. § 523(a)(2)(C)

Section 523(a)(2)(C) provides that, for purposes of dischargeability determinations under § 523(a)(2)(A),

> consumer debts owed to a single creditor and aggregating more than $1,225 for "luxury goods or services" incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than $1,225 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order of relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of a debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act.

11 U.S.C. § 523(a)(2)(C). The presumption of nondischargeability as specified in this section only applies if the debt is a consumer debt under an open end credit plan for "luxury goods and

services" or cash advances. The complaint does not allege facts to show that the presumption applies. The complaint states that between April 8, 2004 and April 25, 2004, 38 to 55 days prior to the filing of the chapter 7 petition, Defendant accumulated charges in the amount of $3,918. (Complaint, ¶7). However, the account statements attached to the Motion do not reveal the nature of the transactions. In fact, the attached statements disclose significant charges for medical and dental expenses, numerous charges for automobile repair services, and charges incurred at various supermarkets and groceries, charges that do not appear on their face to be "luxury goods and services." The facts alleged in the complaint, uncontested as they may be, do not provide a sufficient basis for the Court to conclude that the presumption of nondischargeability should be applicable to the Court's analysis under § 523. Accordingly, it is

ORDERED that Plaintiff's Motion is **DENIED.**

IT IS FURTHER ORDERED that Plaintiff has 30 days from the entry of this Order to amend its complaint to add additional factual allegations sufficient for the Court to reevaluate the § 523(a)(2)(A) and § 523(a)(2)(C) claims. If Plaintiff does not amend its complaint within 30 days then this adversary proceeding will stand as **DISMISSED** without prejudice.

IT IS FURTHER ORDERED that upon filing and properly serving an amended complaint, if Defendant does not timely answer, the Court would entertain another motion for default judgment.

The Clerk is directed to serve a copy of this Order to counsel for Plaintiff, counsel for Defendant and Defendant.

IT IS SO ORDERED.

This, the 25th day of March, 2005.

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MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE